(3)

No. 84-1224

In The

Supreme Court of the United States

October Term 1984

WILBERT LEE EVANS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does the resentencing of the petitioner to death, pursuant to a statute which became effective after petitioner's first sentencing proceeding but before his original death sentence was set aside and his resentencing proceeding commenced, constitute an *ex post facto* violation?

II. Does the resentencing of the petitioner to death violate the Equal Protection Clause?

III. Does a ruling by the Supreme Court of Virginia that a particular jury instruction accurately reflected Virginia law present a federal question?

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at 2-3. Sections 17-110.1 and 19.2-264.4, Code of Virginia, are set forth in their entirety in the appendix to this brief in opposition at A. 1-4.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated, "(Ptn.____)." References to the appendix of

the Petition for Writ of Certiorari will be designated, "(App____)." And references to the appendix to this brief in opposition will be designated, "(A.____)."

STATEMENT OF THE CASE

On April 17, 1981, a jury in the Circuit Court of the City of Alexandria convicted the petitioner, Wilbert Lee Evans, of capital murder. After a separate hearing on the issue of punishment, the same jury recommended the death penalty. On June 1, 1981, the Circuit Court imposed the death penalty in accordance with the jury verdict. The conviction and death sentence were affirmed by the Supreme Court of Virginia on December 4, 1981. *Evans* v. *Commonwealth,* 222 Va. 766, 284 S.E.2d 816 (1981). This Court denied a petition for a writ of certiorari on March 22, 1982. 455 U.S. 1038 (1982).

Petitioner initiated state habeas corpus proceedings in April 1982. He amended his habeas petition on two occasions, the second in early January 1983. The Commonwealth confessed error in the petitioner's sentencing proceeding on April 12, 1983. On May 2, 1983, the Circuit Court of the City of Alexandria entered an order setting aside Evans' death sentence. On September 21, 1983, the Circuit Court conducted an evidentiary hearing to determine whether Evans should be resentenced or his sentence reduced to a life term. By an order dated October 12, 1983, the Circuit Court directed that Evans be resentenced.

On January 30, 1984, the Circuit Court impanelled a new jury for a resentencing hearing, and at the conclusion of that proceeding the jury recommended the death penalty. On March 7, 1984, the Circuit Court imposed the death penalty in accordance with the jury verdict. The Supreme Court of Virginia affirmed Evans' death sentence on November 30, 1984. *Evans* v. *Commonwealth,* ____ Va. ____, 323 S.E.2d 114 (1984). (App. la-15a).

STATEMENT OF FACTS

On January 27, 1981, the petitioner, a prisoner, fatally shot a deputy sheriff who was escorting him to jail in Alexandria. Evans had pretended to be a willing witness for the Commonwealth, but his sole purpose in cooperating with the authorities had been to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he acted on this intent when he killed the victim. (App. 14a). The evidence at the resentencing hearing revealed that Evans had a prior history of criminal convictions in the District of Columbia and North Carolina. (App. 14a). The jury's imposition of the death penalty was based upon a finding of the petitioner's "future dangerousness."[1] *See* § 19.2-264.2, Code of Virginia.

REASONS FOR DENYING THE WRIT

I.

Resentencing the Petitioner to Death Pursuant to a Procedural Statute Which Was in Effect at the Time Petitioner's Original Death Sentence Was Set Aside and His Resentencing Proceeding Commenced Did Not Constitute an Ex Post Facto Violation.

At the time of petitioner's offense, and at the time of his first sentencing proceeding, § 19.2-264.3, Code of Virginia, provided that in a capital murder jury trial the sentencing proceeding must be conducted before the same jury which determined the defendant's guilt. The Supreme Court of

[1] Evans' references to events outside the record which occurred after the jury made its finding (Ptn. 8 n. 10, 17 n. 24; App. 75a-80a) are not only inappropriate, they are also irrevelant to the issues raised in the petition.

Virginia announced such an interpretation of § 19.2-264.3 in *Patterson* v. *Commonwealth,* 222 Va. 653, 283 S.E.2d 212 (1981). At the time Evans' original death sentence was vacated, however, and at the time of his resentencing proceeding, § 19.2-264.3 had been amended to provide that if a death sentence were "set aside or found invalid," a resentencing proceeding could be held before "a different jury" than the one which had determined the defendant's guilt. (Ptn. 2-3). Petitioner contends that the application of the amended version of § 19.2-264.3 to his case constituted an *ex post facto* violation.

Central to Evans' *ex post facto* claim are his assertions that he ". . . was entitled, upon the setting aside of his death sentence, to a sentence of life," and that, if the trial errors which invalidated his first death sentence had been brought to the attention of the Virginia Supreme Court at the time of his first appeal, that Court ". . . would have done precisely what it had done in *Patterson* . . . and commuted his sentence to life." (Ptn. 10; *see also* Ptn. 13-14). These assertions concerning the effect which *Patterson* would have had upon his case, however, are the very same contentions which the Supreme Court of Virginia has already rejected. In its analysis of petitioner's *ex post facto* claim that Court stated:

> Defendant *contends* that application of the revised sentencing law to him violates the prohibition against *ex post facto* laws. . . . Evans says [that] under the law as it existed at the time he committed his offense, at the time he was tried, at the time his first conviction was affirmed, and at all times before approval of the emergency legislation, he was entitled to a sentence of life imprisonment upon the setting aside of his death sentence. He argues that as the result of *Patterson*: "Automatic commutation in such situations thus *became a part of Virginia's law* just as surely as if it had been drafted by the legislature."
>
> Evans *contends* that had the errors which led to the Commonwealth's confession of error been brought to our attention at the time of his first appeal, we would have done in *Evans* what we had done . . . previously in *Patterson*, and Evans would have received a life sentence. He *contends* the considerations which led the Court to commute Patterson's sentence . . . applied with full force to Evans' case. . . . *We reject defendant's contentions* and conclude that there has been no *ex post facto* violation.

(App. 4a-5a, emphasis added).

While it is clear that an *ex post facto* claim raises a federal question, it is equally clear that Evans' claim is premised upon his interpretation of Virginia law—an interpretation which has been unequivocally rejected by the Supreme Court of Virginia. It is beyond dispute that the Virginia Supreme Court is the final arbiter of Virginia law, and thus the final arbiter of how the *Patterson* case and the former version of § 19.2-264.3 would have affected petitioner's case. An interpretation of state law by that state's highest appellate court is binding on this Court. *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961).

Evans' claim that he has been ". . . deprived . . . of the substantial right . . . to have the same jury which heard the facts of his trial decide his fate" (Ptn. 11) is not properly before this Court. Not only did Evans fail to present this claim to the Supreme Court of Virginia, the claim is also directly opposed to what he argued below. (*See* petitioner's "Questions Presented" in the court below at A. 5-7). In his appeal to the Supreme Court of Virginia, petitioner argued, just as he has argued elsewhere in his petition, not that he was entitled to be sentenced by the

same jury which had determined his guilt, but that a resentencing proceeding was barred and that he was entitled to a life sentence. Since the particular claim which Evans now seeks to raise has never been presented to the Virginia Supreme Court, it cannot be properly raised for the first time in this Court.[2] *See Beck* v. *Washington*, 369 U.S. 541, 553-54 (1962).

The Supreme Court of Virginia correctly applied *Weaver* v. *Graham*, 450 U.S. 24 (1981), and *Dobbert* v. *Florida*, 432 U.S. 282 (1977), in rejecting Evans' *ex post facto* claim. In *Weaver*, this Court held: "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment *beyond what was prescribed when the crime was committed*." 450 U.S. at 30 (emphasis added). And in *Dobbert*, this Court recognized that the proper focus of an *ex post facto* analysis is "the quantum of punishment attached to the crime" at the time of the offense. 432 U.S. at 294. Since at the time of his offense Evans had "fair warning," *Dobbert*, 432 U.S. at 297, that the particular type of murder he committed was punishable by death, the Supreme Court of Virginia correctly concluded that he had suffered no *ex post facto* violation.

Petitioner's only attempt to distinguish his case from *Weaver* and *Dobbert* is to reiterate his assertion that he was entitled to a life sentence when his first death sentence was set aside. For example, in attempting to distinguish *Dobbert*, Evans asserts that ". . . it can be said with *absolute* assurance that had Respondent disclosed to the Virginia Supreme

[2] For this same reason, Evans' suggestion that the change in the law in this case ". . . should be considered a bill of attainder" (Ptn. 13 n. 17) is not a matter that is properly before this Court.

Court the errors in Evans' case, Evans would have received a life sentence under the old statute." (Ptn. 13, emphasis in original). As noted previously, however, petitioner's contentions concerning the effect that the prior Virginia law would have had on his case have been categorically rejected by the final arbiter of Virginia law, the Virginia Supreme Court.

This case cannot be distinguished from *Dobbert* in any meaningful way.[3] In *Dobbert*, a defendant, who had been sentenced to death by the trial judge despite the jury's recommendation of a life sentence, argued that a change in Florida law had deprived him of "a substantial right to have the jury determine, without review by the trial judge, whether the death penalty should be imposed." 432 U.S. at 292. This Court rejected that argument and ruled that such a "change in the role of the judge and jury in the imposition of the death sentence" was merely procedural, and therefore applying the new law to Dobbert did not constitute an *ex post facto* violation. *Id.* As in *Dobbert*, the change in the law in petitioner's case was merely procedural in that its only effect was to alter the procedures surrounding the imposition of the death penalty and did not increase the "quantum of punishment" attached to Evans' crime. At the time of petitioner's offense, and at the time of his resentencing proceeding, the crime which he committed carried only two possible punishments—a life sentence or a death sentence.[4]

The Virginia Supreme Court also held that the statutory

[3] *See Jordan* v. *Watkins*, 681 F.2d 1067, 1079, *reh'g denied*, 688 F.2d 395 (5th Cir. 1982); *Knapp* v. *Cardwell*, 667 F.2d 1253, 1262-63 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982).

[4] For this reason, Evans' reliance on *Lindsey* v. *Washington*, 301 U.S. 397 (1937), (Ptn. 14), is misplaced. *See Dobbert*, 432 U.S. at 300.

amendment in this case was ameliorative.[5] The Court found that "[w]here . . . there has been a judicial determination that a sentence to death is invalid because of error during the penalty stage, the new law provides for impanelling a new jury, free of any taint from errors during the first trial, to redetermine the defendant's punishment." (App. 7a). While acknowledging that a defendant who has been convicted of capital murder has the right to a fair and impartial sentencing proceeding, the Court ruled that a defendant, such as Evans, ". . . will not be heard to complain that a change in the law which protects that right is not wholly beneficial to him." (App. 7a). While petitioner contends that the new law, as applied to him, is more onerous than the old, that contention is based upon his misapprehension of his rights under the old law, *i.e.*, that he was entitled to a life sentence upon the setting aside of his original death sentence. As noted previously, the Virginia Supreme Court, as the final arbiter of Virginia law, has interpreted that law in a manner which fatally undermines Evans' contention.

II.

Resentencing the Petitioner to Death Did Not Violate The Equal Protection Clause.

The essence of petitioner's equal protection claim is his allegation that he and the defendant in *Patterson* v. *Commonwealth,* 222 Va. 653, 283 S.E.2d 212 (1981), were "similarly situated," and yet, the Virginia Supreme Court commuted Patterson's death sentence to a life sentence while it affirmed the reimposition of petitioner's death

[5] As this Court made clear in *Dobbert*, findings that a change in the law is procedural or ameliorative are "independent bases" for a conclusion that there has been no *ex post facto* violation. 432 U.S. at 292 n. 6.

sentence. Central to this claim, just as it was to his *ex post facto* claim, is Evans' contention that if ". . . the Virginia Supreme Court [had] been alerted to the flaws in Evans' [first] sentencing proceeding, there is no doubt that his sentence would have been vacated and reduced to life [at the time of his first appeal]." (Ptn. 20). As noted previously, however, this contention has been rejected by the Virginia Supreme Court. (App. 4a-5a). This interpretation of Virginia law by Virginia's highest appellate court is binding on this Court. *See Garner* v. *Louisiana,* 368 U.S 157, 166 (1961).

Although the petitioner has not raised this matter as a separate claim in this Court, he alleges in his petition that the respondent purposefully delayed the resolution of his habeas corpus proceedings so that his original death sentence would not be set aside until after the statutory amendment became effective.[6] (Ptn. 5-6, 18). This allegation, however, ignores the facts that the trial court conducted an evidentiary hearing on this matter, that the trial court made a specific finding of fact that there had been no purposeful delay by the respondent, and that the Virginia Supreme Court held that the trial court's finding was supported by ". . . credible, uncontradicted, and persuasive" evidence, as

[6] Petitioner's assertion that "[t]he Assistant Attorney General who was handling Evans' habeas petition . . . was the same Assistant who had the responsibility in the Attorney General's office of accomplishing the task of securing on an emergency basis legislative enactment of the amendments to the death penalty laws" (Ptn. 6 n. 6) is contradicted by the unrebutted evidence presented at the state evidentiary hearing. (A. 8-12). Evans' assertion that the Commonwealth, at the time of his first appeal, presented to the Virginia Supreme Court, and to this Court, evidence which the Commonwealth ". . . knew to be false" (Ptn. 10), is also entirely without support in the record. The unrebutted evidence demonstrated that the Assistant Attorney General who handled Evans' first appeal was unaware of the error concerning petitioner's original death sentence until after petitioner initiated his habeas corpus proceedings. (A. 12).

well as the Court's own review of the government files which had been inspected by the trial court *in camera.*[7] (App. 9a-10a). Clearly, it is not the function of a writ of certiorari to review findings of fact made by a state trial court after a full and fair evidentiary hearing. *See Wainwright* v. *Witt,* ___ U.S. ___, 53 U.S.L.W. 4108, 4112-13 (January 21, 1985) (recognizing the deference to which a trial court's findings of fact are entitled even on direct review).

The Supreme Court of Virginia, as the final arbiter of Virginia law, found that the statutory change involved in this case ". . . affects only the procedure to be followed if a death sentence is set aside. . . ." (App. 13a). This being so, the Court held that it is ". . . rational to classify individuals potentially affected by the change according to the time when the individual's death sentence was set aside, and the resentencing proceeding commenced, rather than at the time when the person was originally tried and convicted."[8] (App. 13a-14a). To hold otherwise, the Court concluded, would lead to anomalous results. For instance, the position advanced by Evans would mean that a purely

[7] Likewise, Evans' allegation concerning prosecutorial misconduct at his first sentencing proceeding (Ptn. 7) ignores the fact that at the conclusion of the evidentiary hearing on the matter the trial court made a finding of fact that the prosecution had not engaged in misconduct which would bar a resentencing proceeding. On appeal, the Virginia Supreme Court ruled that ". . . credible evidence supports the trial court's finding of fact. . . ." (App. 8a). Furthermore, the Court also correctly decided that even if, *arguendo,* it were assumed that the prosecution had been guilty of serious misconduct, under *United States* v. *Morrison,* 449 U.S. 361 (1981), Evans was entitled only to the fair and impartial resentencing proceeding which, in fact, he had received. (App. 8a).

[8] The Virginia Supreme Court correctly applied the "rational basis" test rather than the "strict scrutiny" test which would be applicable to a suspect classification. (App. 13a). Evans does not contend that the Court applied the wrong standard.

procedural statute could not be applied to a defendant whose death sentence was not set aside until many years after the statute had become effective. (App. 13a).

The Virginia Supreme Court correctly found that the petitioner and the defendant in *Patterson* were ". . . not similarly situated . . . with respect to the amendment to the death penalty statutes." (App. 13a). Evans' death sentence, unlike Patterson's, was not set aside until after the statutory change had become effective. Since, as the Virginia Supreme Court has found, the purpose of the statutory change in this case was merely to regulate the procedure to be followed in the event a death sentence is set aside, applying the law which was in effect at the time Evans' death sentence was set aside and at the time his resentencing proceeding commenced, cannot be termed "irrational." *See Vance* v. *Bradley,* 440 U.S. 93, 97 (1979).

In *Dobbert* v. *Florida,* 432 U.S. 282 (1977), this Court recognized that in regulating its system of criminal procedure a state, consistently with the Equal Protection Clause, may draw the line at some point between those individuals whose cases have progressed sufficiently far in the legal process to be governed by the old law and those individuals whose cases involve acts which properly subject them to the amended law. 432 U.S. at 301. In the case at bar, Virginia has drawn the line so that the amended statute shall apply to all cases where the defendant's death sentence was set aside and his resentencing proceeding commenced after the effective date of the amendment.

Evans attempts to distinguish *Dobbert* by emphasizing that in that case this Court found nothing irrational about applying an amended statute to a defendant ". . . since the new statute was in effect at the time of his trial and sentence." 432 U.S. at 301. He points out that, unlike the

situation in *Dobbert,* the amended statute which was applied to him did not become effective until ". . . two years after his trial [the guilt stage]." (Ptn. 18). This, however, is a distinction without equal protection implications. This Court's recognition in *Dobbert* that the new law was in effect at the time of the defendant's trial has no special significance to Evans' case. Dobbert's death sentence, unlike petitioner's, had never been set aside, and his trial on the issue of guilt, unlike petitioner's, had occurred at the same point in the criminal process as his sentencing proceeding. The only reason that the time of the defendant's trial, as opposed to the time of his sentencing, was significant in *Dobbert* was because the defendant had claimed that, simply because he had committed his offense at a time when Florida's death penalty statute was unconstitutional, he was similarly situated with other defendants whose trials had been conducted pursuant to the unconstitutional statute and who consequently had had their death sentences commuted to terms of life imprisonment. 432 U.S. at 301. In petitioner's case, on the other hand, at no time relevant to the case, neither at the time of his offense nor at the time of his first trial, was Virginia's death penalty statute ever unconstitutional.[9] Since the amended statute concerns only the procedure to be followed in the event a death sentence is set

[9] For this reason, two cases cited by Evans, *Commonwealth* v. *Story,* 440 A.2d 488 (Pa. 1981), and *Lee* v. *State,* 340 So.2d 474 (Fla. 1976), are clearly distinguishable. Both cases, as Evans concedes (Ptn. 15), involved a defendant who was initially tried and convicted pursuant to a statute which was later declared to be unconstitutional. This fact distinguishes those cases from *Dobbert,* as well as the petitioner's case. *Story* is also distinguishable because the result in that case was based upon a finding by the Supreme Court of Pennsylvania that the state legislature ". . . did not intend [the particular statute in question] to apply to an offense committed prior to its effective date." *Commonwealth* v. *Crenshaw,* 470 A.2d 451, 454 (Pa. 1983).

aside, it was entirely consistent with *Dobbert* to apply to Evans the law which was in effect at the time his death sentence was set aside and at the time of his resentencing proceeding.

III.

The Virginia Supreme Court's Ruling That a Particular Jury Instruction Accurately Reflected Virginia Law Does Not Present a Federal Question.

A short time after retiring to deliberate at Evans' resentencing proceeding, the jury sent the trial judge the following question:

> The decision must be unanimous for death, must the decision also be unanimous for life, or does a split decision automatically become life?

In response to the jury's question the trial judge instructed the jury that its verdict "must be unanimous as to either life imprisonment or death."

On appeal, Evans contended that the trial court erred by instructing the jury that a verdict for a life sentence must be unanimous. (App. 11a). His contention was based, as it is now, on his interpretation of § 19.2-264.4(D), Code of Virginia. The Virginia Supreme Court, however, rejected the contention. The Court first noted that "[u]nder established Virginia law, the verdict in all criminal prosecutions must be unanimous," and then stated that it ". . . percieve[d] no legislative intention to change that rule by virtue of the language of Code § 19.2-264.4(D)." (App. 12a). The Court concluded that when § 19.2-264.4 is considered as a whole, including subsection (E) (*see* A. 4), Virginia law requires that the verdict of a capital sentencing jury be unanimous whether it be for a life sentence or a death sentence. (App. 12a).

Petitioner now argues that the Supreme Court of Virginia misread the intent of the Virginia legislature and misinterpreted Virginia law. (Ptn. 22). Such a claim, however, clearly does not raise a federal question and cannot be properly raised in a petition for a writ of certiorari. The Virginia Supreme Court is the final arbiter of Virginia law and its interpretation of a Virginia statute is binding on this Court. *See Garner* v. *Louisiana,* 368 U.S. 157, 166 (1961).

CONCLUSION

The merits of each of petitioner's claims have been carefully considered by the Supreme Court of Virginia. That Court correctly applied the precedents of this Court in rejecting those claims.

The claims raised by Evans either completely fail to present a federal question, or to the extent a federal question is presented, the claims are premised upon his misapprehension of Virginia law. Evans' contentions concerning the effect of Virginia law upon his case have been unequivocally rejected by Virginia's highest appellate court.

Contrary to Evans' assertion, the precise issues raised by this case are unlikely to recur. This case's rather unique chronology and set of facts, as set forth by the Supreme Court of Virginia (App. 1a-4a, 10a, 13a), indicate that this case will have little, if any, impact beyond its own factual limitations. There do not exist any special reasons

or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision of this Court. For these reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

§ 17-110.1. Review of death sentence.—A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall, within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death;

2. Commute the sentence of death to imprisonment for life; or

3. Remand to the trial court for a new sentencing proceeding.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records

as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument. (1977, c. 492; 1983, c. 519.)

§ **19.2-264.4. Sentence proceeding.**—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission

of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ..... foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the

offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160.)

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 840474

WILBERT LEE EVANS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Did Appellant's Re-Sentencing Under A Statutory Scheme Enacted After His Original Trial And Sentence, Which Was Later Set Aside, Violate The Prohibitions Against *Ex Post Facto* Laws, Since, Under The Statutory Scheme In Place At The Time Of The Original Trial And Sentence, The Appellant Was Entitled To A Sentence Of Life Upon The Setting Aside Of His Death Sentence? *(Assignment of Error No. 4)*

2. Notwithstanding The Above, Did The Commonwealth's Purposeful Delay In Conceding Error In The Appellant's Original Sentencing Proceeding Until After The New Statutory Scheme Was Enacted Violate The Appellant's Due Process Rights? *(Assignment of Error No. 2)*

3. Did The Commonwealth's Knowing Use Of False Evidence To Obtain The Appellant's Original Sentence Of Death So Violate Fundamental Fairness And Due Process As To Bar A Subsequent Sentencing Proceeding? *(Assignment of Error No. 1)*

4. Was The Appellant's Re-Sentencing Barred By The Double Jeopardy Clauses Of The United States And Virginia Constitutions? *(Assignment of Error No. 3)*

5. Did The Trial Court's Jury Instruction In Response To The Jury's Question, That A Sentence Of Life Imprisonment Required A Unanimous Vote Violate Virginia Statutes And The Due Process Clause? *(Assignment of Error No. 5)*

6. Did Sentencing The Appellant To Death When All Others Similarly Situated With Respect To The Amend-

ed Death Penalty Statutes Received Life Sentences Deprive The Appellant Of Due Process And Equal Protection Under The Fourteenth Amendment To The United States Constitution And Deprive Him Of Fundamental Fairness? *(Assignment of Error No. 6)*

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA,

vs.

WILBERT LEE EVANS,

Defendant.

F-5105

Alexandria, Virginia
Wednesday, September 21, 1983

JERRY P. SLONAKER,
was called as a witness by and on behalf of the Commonwealth of Virginia, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kloch:

Q Would you please state your full name and your occupation and how long you have been employed by the Attorney General's Office.

A Jerry P. Slonaker, Assistant Attorney General. I've been employed as an Assistant Attorney General, Criminal Division, since July of 1975.

Q And you were the Assistant that handled the direct appeal and *habeas corpus* on the case we are dealing with today?

A That's correct.

Q Mr. Slonaker, I want to go over a couple of things that occurred during the pendency of this case, as well as what your involvement was in Senate Bill 12. You're familiar with Senate Bill 12?

A Yes, I am.

Q Could you give the Court, please, a history in terms of your involvement, if any, in Senate Bill 12?

A Senate Bill 12 was essentially drafted a year before it was introduced. It was drafted by Jim Kulp of our office. For reasons unknown to me, it was not introduced or, if it was introduced, it never got out of committee.

Q In the '82 session?

A That's correct.

Subsequently, not too long before the memorandum which I prepared on September 9th, the Deputy Attorney General in charge of the Criminal Division came to me and Jim Kulp and indicated to us he was interested in having this bill introduced and he wanted Jim Kulp and I to prepare a memorandum explaining the purpose of the bill and outlining the various reasons why it should be introduced.

Q And was that done?

A It was done, that's correct.

Q All right.

Now, incidentally, that memorandum, did that have any reference whatsoever to the Evans case?

A Absolutely not.

Q How about after that, Mr. Slonaker, what involvement did you have in Senate Bill 12?

A I took the bill that Jim Kulp had drafted, sat down

with him. I think we made a few polishing changes to it, but it was essentially as he had drafted.

Q In 1981?

A '81.

I then worked with him to prepare the memorandum for Don Gehring, as per his request, to lay out why we felt legislation was needed and why it was needed as emergency legislation.

Q September 9th, 1982?

A That's correct, right.

Q Okay.

After that particular memorandum, did you have any other input in Senate Bill 12?

A Yes, I did. Mr. Gehring, as Deputy in charge of the Criminal Division, has primary responsibility on all legislation drafted by this division. He does, however, on all bills have some backup people, because occasionally he's required to be out of town and unavailable. So, he asked Jim Kulp and I to be the backup for that bill.

Now, I had some further involvement if you want me to go into that.

Q All right.

A The bill was called before the Senate Court of Justice Committee. I think that was on January 19th. Jim Kulp was going to testify before the Senate committee. He asked that I accompany him to the Senate committee so that I could—we could put our heads together if any question came up. He was to do the testimony. He did that. Subsequently, I was advised by the House to appear to testify. I did appear one date. The bill was not called. I had to go out of town and Jim Kulp appeared, but I don't think he testified. I

think the bill passed without any testimony being given in the House.

Q As it turned out, you never testified in reference to that?

A That's correct.

Q Do you know when the bill ultimately passed the General Assembly?

A Yes, I do, 12:44 p.m. on February 22nd.

Q All right.

Now, had there been any tracing mechanism, as far as you are concerned, as to where that bill was at any particular time, at any time during its pendency?

A I didn't know the time of passage back then. I learned this after these claims were made and there was a check made of the video tape of the session.

Q All right.

So, actually, on February 22nd, any time that day, essentially, you were not called or notified?

A As far as I know, I was not. I was not following that bill on any kind of daily basis at all.

Q And there was no mechanism to contact you whether it was passed or not?

A No.

Q Now, what is the process that a bill goes through from the time it leaves the General Assembly until it gets to the Governor for signature in emergency legislation?

A First, it goes through the Division of Legislative Service. They provide comment on whatever they think is appropriate. And then it comes to the Attorney General's Office for review. In this case, it was reviewed by Don Gehring, the

Deputy in charge of the division, and he indicated his approval and recommendation it be signed.

Q Did you have anything to do with that?

A Not that I recall.

Q Then where does it go?

A At that time, it goes to the Governor's Office and the Governor's staff then provide comment and then the Governor considers it.

Q During that period of time, was there any mechanism to inform you of what was happening at any particular time?

A No, there was not. As I best recall, I simply was informed in some informal fashion, and I don't know if it was a day after, two days after. But, anyway, during that time, someone just mentioned, "By the way, that bill was signed," something to that effect.

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CROSS-EXAMINATION

BY MR. LABOWITZ:

Q Mr. Slonaker, my name is Ken Labowitz.

When was the first time you became aware of, for lack of a better term, the C, D, and E problem in this case, the two misdemeanors that became one misdemeanor resolution in the Circuit Court?

A When the *habeas corpus* petition was filed.

Q Does that mean the second one, in the spring of '82?

A I believe that's correct.

Q And the third *habeas corpus* in January of '83 then raised the separate issue of the uncounselled misdemeanors?

A That's right. Also, clarified some other allegations, one of them being a claim under *Estell* versus *Smith*, but yes, that's correct.